No. 20128

In the

United States Court of Appeals

For the Ninth Circuit

DAVID S. McDANIEL, doing business as McDaniel Plumbing & Heating Company,
Appellant,

vs.

ASHTON-MARDIAN COMPANY (Joint Venture), and TRAVELERS INDEMNITY COMPANY, a corporation,
Appellee.

Appellant's Brief

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JURISDICTION

This is a Miller Act claim, 40 U.S.C. Sec. 270b, by a subcontractor against a general contractor and its bonding company. The question of liability was presented on cross motions for summary judgment by the parties. Judgment for defendant was entered on April 1, 1965, (T. 37) and this appeal followed on April 5, 1965 (T. 38) with appropriate bond (T. 39).

STATEMENT OF FACTS

This case arises in consequence of the construction of a Defense Department project known as the Ajo Air Force

Station. The general contractor on that project was the Ashton-Mardian Company, a joint venture, which was duly bonded by the Travelers Indemnity Company, the other defendant here. The contract of Ashton-Mardian with the Government, Exhibit 1 here, provided that the work was to be finished in accordance with paragraph SC-1 of the specifications. It is stipulated by the parties that the work was contemplated to take 450 days.* It is also stipulated that in actual fact the work took 196 days longer than was contemplated at the time of the execution of the contract.

This contract was executed on March 30, 1956. On that same day, Ashton-Mardian Company executed a contract with plaintiff, a subcontractor, to do the plumbing and heating work on this job. See Exhibit 2. While the main contract, Exhibit 1, with its attachments, runs many volumes, the contract between the defendant Ashton-Mardian Company and the plaintiff, is a simple document which provided that plaintiff was to receive some $400,000 for work in accordance with the plans and specifications. The subcontract was expressly made subject to the main contract and also to certain "terms and conditions" set forth on the back of the subcontract.

The 196 days extra time spent on the job was caused either by (a) a poor survey resulting in a protracted delay in finishing the main access road; or (b) by change orders. The relevance of each of these to the matter at hand will be considered more fully below. In form, at least, the delays

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*To avoid burdening the records, we have not submitted the bulky three volume specifications. These include a requirement that the general contractor will "complete the work within 450 calendar days after the receipt of notice to proceed."

are due principally to Change Orders 4 and 5 which added certain "Arctic Towers" to the job.* Change Orders 4 and 5 covered 182 days of the 196 day contract extension.† Change Order No. 30 was for 14 days. It involves a minor matter with no bearing here.

We note only to put it aside that there were other change orders—there were a total of thirty-nine—and that some of those other change orders did involve plaintiff. They added a sufficient sum that its final contract was for about $462,000. But what is essential to this case is that those changes which did affect plaintiff did not in any way affect the *time* of the job. These changes principally simply changed the size of pipe which was being used but did not materially affect the time required for its installation.‡

Plaintiff received no economic benefit from any of the orders which extended the time of the contract. If the delay is attributed to the necessity of building a road and obtaining additional borrow for the purpose, the general contractor, defendant here, was paid a considerable amount per yard for all additional borrow, of which there was much; but none of this was plumber's work. If the delay is attributed to the change orders, none of these change orders involved the plaintiff. In all of Change Orders 4, 5 and 38 put together, there is only one allowance of any payment

*Arctic Towers are structures used in the operation of radar which were first developed in the far North; hence the observation in the opinion of the Armed Services Board of Contract Appeals that they were "something of an incongruity in Arizona."

†See Corps of Engineers Board of Contract Appeals Opinion, p. 6. The opinions will hereafter be referred to as the Engineers' Opinion for that just cited and the Armed Services Opinion for the final appeal opinion.

‡Plaintiff has released the actual exhibits for filing in the Court in Tucson, and therefore does not have the numbers available.

of any amount to plaintiff, and this was for less than $300. Arctic Towers don't take plumbing.

It is also stipulated that the plaintiff was at all times up to his own proper schedule under the original contract. It is stipulated that "the matter shall be submitted on this issue of liability as a situation where plaintiff did not, itself, cause any part of the delay period." As the Engineers' Opinion correctly summarizes, up to April 1, 1957, when the defendant altered the schedule of the work, "The McDaniel Company was on schedule at all times. And in fact, as of 1 April 1957, the subcontract was in a status 79.8% complete on the basis of progress payments; whereas the over-all prime contract was only an approximate 54% complete at the same time."

The consequence of the delays in the work and specifically of the change orders was that the plaintiff was kept on the job for substantially the entirety of the 196 extra days in order to be able to get to work and finish his part in it which otherwise, so far as he was concerned, could have been completed under the original contract.

It was unnecessary for the Defense Department Boards to determine precisely how long plaintiff had been delayed, but the Engineers Board found that, "On the whole factual record, however, we can and do determine that revisions on the Arctic Tower foundations caused necessary carry-over of some substantial part of the subcontract work, i.e. certainly more than a portion *de minimis.*"*

The result is that the delay caused the plaintiff damage, the precise amount of which need not be specified here since the only issue presently before the Court is liability. But obviously there is some damage—as the Engineers Board held, it is clearly more than *de minimis*. Keeping men on

*Engineers Opinion, p. 13.

the job for a protracted additional time, keeping rented equipment available, carrying overhead, and many other elements result in a loss to plaintiff from the delay.

The Proceedings Before the Defense Department.

This action was duly filed in the federal district court to compensate plaintiff for the delay. The defense rejoined that the disputes clause of the contract between it and the Government was incorporated by reference in the subcontract and that therefore the disputes clause would have to be followed. This clause appears at page 2a of Exhibit 1. The net effect is that "any dispute concerning a question of fact arising under this contract" should go through the Defense Department appellate procedures. Any such determination is there declared to "be final and conclusive upon the parties hereto."

The practice in matters of this sort is that a general contractor may make a claim against the Government. He may do so in fact for the benefit of subcontractors, although at no point do the subcontractors become parties before the Government agency and at no point does the Government recognize any obligation to them. That procedure was followed here. Plaintiff's counsel here appeared in the name of the defendant Ashton-Mardian Company before the Contracting Officer in Los Angeles, before an intermediate appeals process at San Francisco, before the Engineers Board of Contract Appeals in a hearing in Phoenix, and finally before the Armed Services Board of Contract Appeals in Washington.*

*Only its irrelevancy here causes plaintiff to abstain from commenting with pen dipped in vitriol on the barbaric procedure described in the text. If the Defense Department were just one half as brutal with our foreign enemies as it is with our domestic friends, the Cold War would have been over long since.

It would be needlessly tedious to narrate all of the intermediate steps and decisions. The findings of the Contracting Officer of November 20, 1958, are here as Exhibit 3. His supplemental findings of September 4, 1959, are here as Exhibit 4. The decision of the Engineers Board is here as Exhibit 9, and the decision of the Armed Services Board, along with its denial of rehearing, are here as Exhibits 16 and 17. Suffice it to say that if this was a remedy to be exhausted, it has been exhausted with rare thoroughness. The essential elements of the last two opinions are these:

(1) *Engineers Board.* This is a twenty page document. The decision portion runs from pages 17 to 20 and holds first, that, without condoning deficiencies in the survey which led to the road delay, the road condition "had no substantial effect upon the subcontractor's access or consequentially upon the subject matter of this appeal."

The delays therefore had to be attributed to the change orders only. So far as Change Order No. 4 was concerned, Ashton-Mardian, defendant here, having accepted it, was "estopped from assertion that such changes go beyond the scope of the contract." So far as Change Order No. 5 is concerned, this Board held that the Government was not unreasonable in the length of time which it took to make this change, which proved necessary because of unexpected rock conditions and that therefore the general contractor was barred from recovery under *United States v. Rice*, 317 U.S. 61, 63 Sup.Ct. 120, 87 L.Ed. 53 (1942).

(2) *Armed Services.* The opinion of the final board, Exhibit 16 here, after stating the facts reaches its decision at page 5. This Board affirmed that the "completion status of the road did not delay access to the building areas." It found that the case therefore was under the rule that "the Government is obligated to compensate the contractor only

for the direct cost of performing the change or overcoming the changed condition but not, except in the form of a time extension, for the delay effect the added or increased work may have on the remainder of the work which is unchanged." It held that this case was not within any exception to that rule. It affirmed that the general contractor by accepting the basic Change No. 4 adding the Arctic Tower to the contract estopped itself from contending that any such change was beyond the scope of the contract. Hence it held, following the *Rice* case, *supra*, that the Government was responsible to the general contractor only for the direct costs of the additional work and not for any delay damages.

Proceedings in the Court Below.

Upon what was indeed exhaustion of the administrative remedy, the matter was presented to the court below. To avoid duplication, it was stipulated that the issue of liability only should be presented on cross motions, and that the Defense Department record should be bodily imported.

This was done by stipulation (T. 26-29). At the risk of duplication, we reproduce what are factually the principal paragraphs:

> 4. "The plaintiff entered into a subcontract with the Ashton-Mardian Company, a copy of which is attached hereto as Exhibit 2.
>
> 5. "By virtue of the prime contract, it was contemplated that the work in question would take approximately 450 days. In actual fact, the work took 196 days longer than was contemplated at the time of the execution of the contract.
>
> 6. "The added 196 days, hereafter called the delay period, was the product in part of Government change orders to the Ashton-Mardian Company and in part of other circumstances which need not be specified here.

There were a total of thirty-nine such written change orders, three of which contained the time extensions. They are attached hereto as Exhibit 18. The plaintiff did not receive any increases in the amount of his subcontract by reason of the changes required by these three orders, excepting only $242.00 on Change Order No. 4. This matter shall be submitted on this issue of liability as a situation where as to at least a part of the delay period the plaintiff received no economic benefit therefrom. However, these facts shall be without prejudice to the defendant's claim and right to show on the issue of damages the following matters, each of which the plaintiff denies: (a) That plaintiff did, in fact, receive economic benefit from changes which required additional time for performance, other than those which contained time extensions, and (b) That not all of the time extensions were for the performance of the three change orders in which they were contained, additional time being needed for some of the other change orders and the need for time extensions being accumulated and granted on the three specific orders.

7. "The plaintiff was substantially on schedule in his work and completed it within the total time required for performance, including the additional 196 days. The practical effect of the delay period was that plaintiff performed its work including the additional work required under its change orders over a substantially longer period of time than was originally contemplated for the initial work. As has been noted above, it is agreed that this delay, if it is in law compensable, may have caused some damage to plaintiff, but there is no stipulation whatsoever as to the amount, this question being reserved. In any event, the matter shall be submitted on this issue of liability as a situation where plaintiff did not, itself, cause any part of the delay period."

The trial court gave judgment for the defendants with a brief decision (T. 32) as follows:

"The subcontract between the parties (Exhibit No. 2) does not expressly provide, or imply, that use-plaintiff would be able to complete its work under the subcontract within 450 days. In fact, it states that: 'The Sub-Contractor agrees to perform the work progressively as directed by the Contractor and complete the entire project In accordance with Plans and Specifications and as directed by Contractor'. The provision can mean only that defendants are accorded the right to direct and control the time and manner of doing the work covered by the subcontract.

"Further, Paragraph 16 of the Terms and Conditions of the subcontract rendered applicable to use-plaintiff the terms of the General Contract between defendants and the United States (Exhibit No. 1); and Section 3 of the General Provisions of that Contract gave the United States the right to make changes within the general scope of the Contract without being obligated to defendants for any delay damages or for anything other than the direct costs of the additional work and equitable time extensions for any additional time required for performance of the changes.

"These provisions of the subcontract and the General Contract make it clear that both use-plaintiff and defendants knew when they entered into the subcontract that it could very well happen that the work under the subcontract would not be completed within the 450 days specified in the General Contract; that changes might be made by the United States which would necessarily extend the performance period of the General Contract and, consequently, the performance period of the subcontract. Both use-plaintiff and defendants knew, also, that if any changes authorized by Section 3 and ordered by the United States should result in delay damages to defendants, no compensation for such dam-

ages could be recovered by defendants from the United States. Hence, it is reasonable to conclude that use-plaintiff and defendants did not intend their subcontract to mean that use-plaintiff could recover damages from defendants for delays occasioned by proper change orders of the United States.

"Use-plaintiff was delayed to some extent in completing the work covered by its subcontract, but the delay was not caused by any wrongful act or default of defendants. Such delay resulted entirely from changes ordered by the United States in Change Orders Nos. 4 and 5 (Exhibit No. 18); and each of these orders was one which the United States had a right to make and which defendants were required to carry out under the terms of Section 3, the United States being required only, as it actually did, to compensate defendants for the direct costs of the additional work and to extend the time for completing the General Contract for a period commensurate with the time required for the performance of the changes. The changes required by the United States involved no 'cardinal changes'."

This appeal followed; see the Jurisdictional statement for details.

CONTRACT PROVISIONS

Possibly relevant provisions of the subcontract, Exhibit 2, are paragraphs 2, 6 and 16 of the Terms and Conditions. These are as follows:

"6. The Sub-Contractor agrees to fully do and perform this work and in all things execute and complete this contract within the time herein limited for that purpose or within said term as it may be extended by reason of delay, changes, additions, or other reasons called for or allowed by the Contractor and Architect and/or Engineer, and should the Sub-Contractor fail to complete the work or deliver the materials within

the time agreed upon, the Sub-Contractor agrees to pay and will pay to the Contractor for each and every day of such delay beyond the time of completion of work or delivery of materials as herein defined, the sum of $..... in either case which sum is hereby fixed, in view of the difficulty of estimating such delay, agreed upon, and determined by the parties hereto as the liquidated damages that the Contractor will suffer by such default and not by way of penalty and shall be deducted as such from the balance due the Sub-Contractor. Should the damages exceed the sum due or to become due, the Sub-Contractor then, and in that event, shall be liable to the Contractor for such difference."

"16. Insofar as the same are applicable to the work covered in this Contract, the Sub-Contractor agrees to be bound to the Contractor by the terms of the General Contract between the Contractor and the Owner and the specifications in connection therewith and to assume toward the Contractor all obligations and responsibilities the Contractor by these documents assumes towards the Owner. In particular, but without limitation, the Sub-Contractor agrees: (1) That the determination of any disputed question made pursuant to the provision of the General Contract and the general conditions, drawings, and specifications in connection therewith shall be binding upon the Sub-Contractor; and (2) the provisions of the General Contract with respect to the termination of the General Contract shall be applied to this Sub-Contract and shall be binding upon the Sub-Contractor; and (3) that in all respects the relationships of the Contractor and the Sub-Contractor are to be governed by the plans and specifications named above, by the agreement, and the general conditions of the General Contract so far as is applicable to the work thus sub-let."

In addition to the foregoing, Section 2 of the contract is as follows:

"The Sub-Contractor agrees to perform the work progressively as directed by the Contractor and complete the entire project In accordance with Plans and Specifications and as directed by the Contractor."

QUESTIONS PRESENTED

1. If a subcontractor agrees to do work for a general contractor within a fixed period of time, and is thereafter required to extend his services for a much longer time at loss to himself and without his own consent or benefit, is he entitled to recovery for the delay?

2. If the foregoing question may be answered in the affirmative as a general principle, is there anything in this contract, or on these facts, to take this case out of the general rule?

SUMMARY OF ARGUMENT

It is a fixed and well-established principle of the law of building contracts that a subcontractor is entitled to recover from a general contractor for job delays which are not caused by the subcontractor. This right extends to the subcontractor unless he has waived it. In the instant case, there were indisputably delays and equally indisputably they were not caused by the subcontractor. It follows that he is entitled to recovery unless something in the contract documents operates as a waiver of his right in this regard.

There is no such waiver here. The contract contemplates that the work is to be done in a 450 day period. There were provisions by which the Government might enlarge or alter the job and extend the time therefor, but no provisions by which it could do so without compensation. Certainly there is nothing in the contract by which the subcontractor can be held to have agreed that he would hold himself immobile, doing nothing but run up costs, have over half a year with-

out compensation. The general rule applies and he should recover.

ARGUMENT

I. Any Contractor Delayed in His Work by Action of the Other Contracting Party Is Entitled to Damages Therefor.

We assume that there will be no serious issue on the general proposition that if a person contracts to do a job with the reasonable expectation that it will be done within a particular period of time, and if he is delayed in doing it through no fault of his own but by virtue of the act of the other contracting party, he is entitled to damages.

> "The building contractor's claim for damages may be based in part on losses due to the owner's causing unreasonable delay in completion. The contractor's machinery and labor force may have been kept idle, when but for the delay they would have been income producing. In such case these losses must be estimated. It is proper to admit expert testimony as to the rental value of machinery, the extra amounts paid to hold the labor force together, and also a reasonable proportion of overhead costs fairly chargeable to this job during the delay." 5 *Corbin on Contracts* 429.

The general right of the contractor to recover damages for delay not caused by him is well established.

> "In calculating damages to a contractor, when without his fault the other party, during the progress of the work, delays it, the object is to indemnify him for the losses sustained and gains prevented by the action of the party at fault, viewing these elements in relation to each other. . . . The measure of damages for delay in the performance of a construction contract is the actual loss sustained by reason thereof. . . ." *Grand Trunk Western R. Co. v. H. W. Nelson Co.,* 116 F.2d 823, 827 (6th Cir. 1941).

The general rules are well stated in an Oregon opinion which has been adopted by the Ninth Circuit in *Northeast Clackamas C. E. Co-op v. Continental Cas. Co.*, 221 F.2d 329, 335 (9th Cir. 1955):

> "It is the rule that in carrying out a contract, whether time is of the essence or not, the owner cannot delay or retard the contractor in the progress of the work or prevent performance thereof without liability; and, where the owner under the contract is bound to furnish materials or to do any other thing required to be done by him pursuant to the contract, he must do that thing in such a way as not to retard the contractor; and, if through the act or omission of the owner under such circumstances the work is delayed in such a way as to make performance impossible, the contractor can recover upon the quantum meruit."

For another statement of the rule, see *Frank T. Hickey, Inc. v. Los Angeles Jewish Com. Coun.*, 276 P.2d 52, 59 (Cal.App. 1954) as follows:

> "Ordinarily, as between a subcontractor and the contractor who is in control of the work being performed, the law places the latter under an obligation to make good all losses consequent on delays in the progress of the work not attributable to the subcontractor."

The passage just quoted exactly and precisely fits this case.*

II. The Trial Court Erroneously Failed to Apply the General Rule.

The foregoing cases establish the general rule that as by the subcontractor and contractor, the contractor must bear the responsibility for delays not occasioned by the sub-

*For the most comprehensive collection of cases on the general subject we have seen, see the annotation at 91 L.Ed. 48.

contractor. As had been said, "Ordinarily, a general contractor is liable to a subcontractor for damages resulting from delays not attributable to the latter." *Lichter v. Mellon-Stuart Co.*, 193 F.Supp. 216, 221 (W.D.Pa. 1961). Aff'd., 305 F.2d 216 (3d Cir. 1962). The question then becomes whether anything in these particular contract documents amounts to a waiver by the plaintiff of the protection of the general rule.

The substance of the trial court opinion is that McDaniel signed a contract by which Ashton-Mardian has "right to direct and control the time and manner of doing the work covered by the subcontract." The Government could extend the general contractor's time *by paying for it* in the form of change orders. Therefore—so runs the argument—the general contractor could extend the time of the subcontractor *without paying for it.* A certain *non sequitur* here will be noticed. As a matter of contract construction, the trial court concluded that these parties "did not intend their subcontract to mean that [McDaniel] could recover damages from defendants for delays occasioned by proper change orders of the United States."

1. Ashton-Mardian was kept on the job for 196 extra days in connection with the three change orders. It was fully compensated for this 196 days by being paid for its added work. But McDaniel was simply kept in a state of suspended animation. He gets nothing while Ashton-Mardian receives full compensation.

It is immaterial that this is a consequence of change orders. Of course it was, but Ashton-Mardian accepted the change orders. It is therefore estopped from complaining about it. Hence the Armed Services opinion rests flatly upon the estoppel of Ashton-Mardian. See particularly the text at page 7 and note the reliance on *Silberblatt & Lasker, Inc.*

v. United States, 101 C. Cls. 54 (1944) which has been cited at every stage of the appeal. The substance of this decision is that where a general contractor acquiesces in a change order, he will not be heard to complain about it. As this is restated in the Armed Services opinion, "The contractor's affirmative acceptance and performance of the change dooms any contention it might now put forward in that regard."

What the defendant says here is that because Ashton-Mardian saw fit to accept the change which was profitable as to it, McDaniel is bound by that acceptance and is to be paid nothing. If this were in the contract, the contract would indeed be a blank check.

We press this point: The essential position of the defendant is that by virtue of these contract documents, McDaniel gave Ashton-Mardian the right to keep McDaniel on the job for so long as happened to suit the pleasure of Ashton-Mardian and the Government; and this without fault or compensation for McDaniel. This is an exceedingly improbable contract interpretation. "It is quite possible for two parties to make a valid contract that seems unfair or unreasonable or even absurd to other people. If, however, the words of agreement can be interpreted so that the contract will be fair and reasonable, the court will prefer that interpretation. Although at times the only reasonable interpretation may show that an unreasonable contract has been made, the unreasonableness of the result tends to make some other interpretation a reasonable one. It is possible for a party to overreach himself and defeat his own ends by the use of long printed forms containing complicated provisions for his own advantage and none for the other party." 3 *Corbin on Contracts,* 210-211.

Where possible, a contract will be interpreted to be reasonable, fair, and just. *Aronson v. Arkelian, Inc.*, 154 F.2d 231 (7th Cir., 1947); *Kenyon v. Automatic Instrument Co.*, 160 F.2d 878 (6th Cir. 1947). If this contract means what the defendant asserts, a man would be a plain boob to sign it; and yet where possible, a contract will be interpreted to be an agreement such as prudent men would naturally enter into. *Liberty Nat. Bank v. Bank of America*, 218 F.2d 831 (10th Cir., 1955).

2. Approaching its contract in a spirit of interpreting it to make sense, there is nothing in it by which McDaniel gave Ashton-Mardian any such blank check.

(a) The subcontractor signed a typical brief document which is vaguely said to be subject to the main contract. The main contract provided that the work was contemplated to take 450 days.* While the main contract provided for change orders, it of course does not provide that anyone within its terms is to work for nothing.

(b) Plaintiff has no contract with the Government. He sues on a contract with Ashton-Mardian. The trial court refers to Section 2 of this contract which provides that "the Sub-Contractor agrees to perform the work progressively as directed by the Contractor and complete the entire project In accordance with Plans and Specifications and as directed by Contractor." This, as the trial court says, "can mean *only* that defendants are accorded the right to direct and control the time and manner of doing the work covered by the subcontract." [Emphasis added.]

Quite so; it means this, and "only" this. Certainly nothing in that language operates as a waiver of the right to be paid if the work is spread over a period in excess of the contemplated time.

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*Paragraph 5 of the stipulation of the parties (T. 27) provides that "by virtue of the prime contract, it was contemplated that the work in question would take approximately 450 days."

The only other control provisions relied upon by the trial court are the provisions showing that the Government could make change orders of the general, and that if they made such change order, it would pay only for the direct costs and would make equitable time extensions. Assuming this to be true, this is a direct provision that in case the job is extended by virtue of change orders, the general will be paid for the changes. Yet McDaniel is paid nothing for the very same changes on which he loses and the general has a substantial gain.

The trial court concludes that "it is reasonable to conclude" that plaintiff and defendant "did not intend their subcontract to mean that [McDaniel] could recover damages from defendants for delays occasioned by proper change orders of the United States." We agree that in the ambiguous cases, the question of whether the plaintiff may recover for delay depends upon "the reasonable expectations" of the parties. *Johnson v. Fenestra, Inc.*, 305 F.2d 179, 181 (3d Cir. 1962). It is of course the heart and soul of our argument that few things could be more unreasonable than the intent attributed here.

Of course a subcontractor can make an express agreement to waive delay claims. In *Sammons-Robertson Co. v. Massman Const. Co.*, 156 F.2d 53 (10th Cir., 1946), the prime contractor was doing work for a federal agency. The possibility of delay because of clouded land title was expressly recognized, and the subcontract in so many words provided that the sub should have no delay damages if it took unexpected time to clear title. Even a no-damage clause will not be applied if the delay is unreasonable, *Northeast Clackamas C.E. Co-op v. Continental Cas. Co., supra.*

But we do not reach such refinements here because in this contract between McDaniel and Ashton-Mardian

(drafted by Ashton-Mardian with all the consequences as to construction which this entails), there is no clause purporting to cut off McDaniel's rights as to delay. The case is covered by *Studer v. Rasmussen,* 344 P.2d 990 (Wyo., 1959), in which a subcontractor sued a prime who in turn had a federal government contract. The sub was delayed for 90 days and sued for damages. The defense relied upon the *Rice* and *Foley* cases. The court held the subcontractor entitled to delay damages; it expressly rejected any contention that the sub waived its rights by continuing with the work. The decision is a compendious review of the authorities and the issues, and solidly supports the right of the plaintiff to recover here.

CONCLUSION

McDaniel agreed to do a job for defendant in 450 days. He was ready, willing, and able to do it. By virtue of agreements between the defendant and the Government, agreements which were lucrative to the defendant but barren to McDaniel, he was kept on the job for six extra months. Defendant may have been able to keep McDaniel on the job, but not without paying for it. The defendant should be found liable for the delay.

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July, 1965

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN P. FRANK

(Appendix Follows)

Appendix

All exhibits in this case were received under one stipulation, and the list of exhibits and the stipulation are set forth at T. 26-29, the list being on page 29. The list is as follows:

1. Basic Contract Between Parties (Exhibit 1)
2(a). Acceptance Letter of Government
2. Subcontract Between McDaniel and Ashton-Mardian
3. Denial and Findings of Contracting Officer of November 20, 1958
4. Supplemental Findings of September 4, 1959
5. Appeal to Claims and Appeals Board
6. Transcript of Hearing Before Board Member Campbell
7. List of Corrections in Transcript
8. Exhibits in the Matter Before Board Member Campbell
9. Decision of Board Member Campbell
10. Appeal by way of Complaint to Armed Services Board of Contract Appeals
11. Government's Answer to No. 10
12. Deposition of Esslinger
13. Affidavit or Deposition of Putnam
14. Affidavit of Esslinger
15. Miscellaneous Log Entries Utilized in Connection With Appeal
16. Opinion of Board of Contract Appeals
17. Opinion on Reconsideration
18. Thirty-nine Change Orders